CONSTITUTIONAL PROTECTION OF CIVIL RIGHTS PICKETING

NAACP v. Overstreet
321 Ga. 16, 142 S.E.2d 816,
*cert. granted, 382 U.S. 937 (1965)**

Is the right to reputation or good will more important than the right to protest against discrimination? This question arises when a business which has allegedly practiced racial discrimination sues to recover damages caused by civil rights picketing. Picketing can damage the reputation or good will of a business, and society has an interest in preventing and redressing attacks upon reputation. But, there is a conflict between this interest and the values promoted by the first and fourteenth amendments. When interests in public discussion are particularly strong, the Constitution should limit the protection afforded by the civil law of picketing.[1] To what extent is civil rights picketing protected by the Constitution? This question was recently considered by the Georgia Supreme Court.

The owner of a grocery store in Savannah, Georgia recovered 35,793 dollars compensatory damages and 50,000 dollars punitive damages in an action against the National Association for the Advancement of Colored People (NAACP), the Savannah chapter of the NAACP, and two of its officers for conspiring to destroy his business by unlawful picketing. The grocer allegedly beat and discharged a fourteen-year-old Negro employee for alleged stealing. Officers of the Savannah branch called a public meeting to protest the beating and organized a picket line in front of the store urging a boycott. A crowd of angry Negroes gathered; several acts of violence were committed; customers were frightened away. Defendants argued that since no NAACP picket committed any unlawful acts, the trial court's judgment violated constitutionally protected freedom of association. The argument was rejected by the Georgia Supreme Court. The court also held that the picketing was not constitutionally protected freedom of speech for two reasons. Firstly, the court found that the grocer had not been motivated by racial prejudice and that the sole purpose of the picketing was to avenge the beating; this *purpose* was held unlawful because courts, not private persons, should punish criminal acts. Secondly, the court found that picketing around the store incited mass picketing, force, violence, intimidation, and harassment which constituted picketing in an unlawful *manner*.

When does the Constitution protect civil rights pickets from civil liability? Although the Supreme Court has yet to consider a case of this kind, it has developed policies which seemingly do protect them from liability. The

* At the date this issue went to press, the writ of certiorari was dismissed as improvidently granted in a 5-4 decision. N.Y. Times, April 28, 1966; p. 20C, col. 3.

[1] The Constitution looks at the content of the communication evaluated in the context of its social and political setting, and not just at the form of communication. Hence, freedom of speech is not limited to verbal communication, but may also include picketing. Brown v. Louisiana, 34 U.S.L. Week 4143 (U.S. Feb. 23, 1966).

Georgia decision raises a variety of issues which demonstrate that the problem is to identify these policies and discover when they apply. The problem will be approached within the following framework: (1) Upon what grounds should the Supreme Court review a decision awarding damages for picketing a business which has allegedly practiced racial discrimination? (2) Should the Court examine the evidence to see if it supports the judgment? (3) What criteria should it use to determine what is constitutionally protected picketing?

GROUNDS FOR SUPREME COURT REVIEW

The NAACP argued that the judgment violated both its freedom of speech and its freedom of association. Although the Court has not considered a case involving *civil* liability for civil rights picketing, it has used both freedoms to protect civil rights organizations and their self-help techniques[2] from the *criminal* laws of the various states.[3] These decisions make it clear that the Court has recognized the right of Negroes to organize to protest against racial discrimination. What a state may not do through its *criminal* law should likewise be beyond the reach of its *civil* laws.[4] Fear of damage awards may be markedly more inhibiting than fear of *criminal* convictions.[5] Hence, the Supreme Court should review and reverse a judgment for unlawful picketing if it imposes civil liability upon constitutionally protected conduct. But, what conduct is protected by freedom of association and freedom of speech?

Freedom of Association

Rights of free association are recognized as conferred by the first amendment. This gives some needed protection to civil rights organizations operat-

[2] The self-help tactics of civil rights organizations have generated extensive litigation involving injunctions and criminal convictions for criminal trespass, breach of the peace, obstruction of sidewalks, and injury to trade or commerce, but this author found no cases prior to this one in which damages were sought. See 5 Race Rel. L. Rep. 935 (1960); Annot., 93 A.L.R.2d 1284 (1964).

[3] Edwards v. South Carolina, 372 U.S. 229 (1963), held that breach of the peace convictions arising out of a demonstration at a state house violated freedom of speech; NAACP v. Button, 371 U.S. 415 (1963), held that application of Virginia's barratry statute to the NAACP's efforts to facilitate the Negro's access to the courts violated freedom of association.

[4] *But see* Avins & Crutchfield, "Prime Facie Tort and Injunction—New Remedies Against Sitdowns," 23 Ala. Law. 163 (1962). The authors suggest that civil remedies may be beyond the scope of Supreme Court review.

[5] New York Times v. Sullivan, 376 U.S. 254 (1964), held that recovery for libel of a public official requires proof of actual malice. Mr. Justice Brennan stated, "What a state may not do by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.* at 277. To support his conclusion the Justice pointed out that convictions result in fines much smaller than possible damage awards and that criminal actions are surrounded by procedural safeguards not present in civil actions.

ing in hostile southern states.[6] The Court has reasoned that freedom of speech is meaningless to Negroes unless they can form organizations to assert their rights.[7] Thus, if a state court decision discriminates against such an organization, either by discouraging membership in it or by destroying its effectiveness, freedom of association is violated. For example, *NAACP v. Alabama*[8] held that a state may not require the production of membership lists because the social and economic repercussions would deter sympathizers from joining the organization. Nor may a state destroy the effectiveness of an organization by forbidding activities which are essential for it to protect the rights of its members. This principle was developed in *NAACP v. Button*[9] which held that a state may not apply its barratry statute to the NAACP's efforts to assist Negroes to assert their rights in the courts.

The reasoning of *Alabama* and *Button* is relevant to consideration of civil liability for civil rights picketing. A hostile court should not be permitted to cripple financially organizations such as the NAACP by misreading the evidence or misapplying the law.[10] Such a tactic would certainly be as clear a violation of freedom of association as requiring the production of membership lists; for sympathizers would not contribute money to the or-

[6] Gibson v. Florida Legislative Investigating Comm., 372 U.S. 539 (1963); NAACP v. Button 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

[7] In NAACP v. Alabama, *supra* note 6, at 460, Mr. Justice Harlan stated, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." For a discussion of the evolution of the freedom of association doctrine and its relation to freedom of speech see Mr. Justice Douglas' opinion in Griswold v. Connecticut, 381 U.S. 479, 482-84 (1965); Fellman, "Constitutional Rights of Association," 1961 Sup. Ct. Rev. 74.

[8] 357 U.S. 449 (1958).

[9] 371 U.S. 415 (1963). The protection afforded Negroes by freedom of association may be closely related to the protection afforded by equal protection and freedom of speech. Tussman & tenBroek, "The Equal Protection of the Laws," 37 Calif. L. Rev. 341 (1949), describe how the protection afforded Negroes by the equal protection clause developed out of due process principles. Freedom of association may be based on a similar metamorphosis. But, whereas equal protection prohibits state discrimination against an individual because of his race, freedom of association, as in *Alabama,* prohibits a state from discriminating against an organization because it is associated with a civil rights movement. Compare Shelley v. Kraemer, 334 U.S. 1 (1948). And, while freedom of speech prevents a state from punishing an individual for engaging in certain activities, freedom of association may as in *Button* prevent a state from punishing an organization for engaging in similar activities. See Edwards v. South Carolina, 372 U.S. 229 (1963).

[10] To suggest that a court might do this seems irreverent, but see 30 Brooklyn L. Rev. 325 (1964); McKay, "The Repression of Civil Rights as an Aftermath of the School Segregation Cases," 4 How. L.J. 9 (1958). See note 9 *supra*; compare Garner v. Louisiana, 368 U.S. 157 (1961); Thompson v. City of Louisville, 362 U.S. 199 (1960), which reversed convictions found so totally devoid of evidentiary support as to violate due process.

ganization and its financial foundation would be destroyed. The *Button* reasoning should also prohibit a hostile state judiciary from preventing an organization like the NAACP from using a picket line to publicize acts of racial discrimination. Often public sanction is sufficient to remedy discrimination without recourse to the courts. Because of limited financial resources, civil rights organizations have limited access to the primary media of communication; the picket line may be the only medium available by which a grievance can be communicated to the public. Therefore, to deprive its members of the opportunity to protect their rights in this manner would greatly diminish the effectiveness of the organization. Thus, *Overstreet* presents a situation appropriate for review by the Court on freedom of association grounds.

Freedom of Speech

Traditionally, the determination of liability for picketing has been largely left to the trial court.[11] Since picketing is an intentional interference with a business' relations, under a tort theory it is actionable unless justified.[12] It is not justified if conducted in an *unlawful manner* or for an *unlawful purpose*.[13] The *unlawful manner* test imposes liability upon picketing which is more than an honest and persuasive appeal. Thus, it is unlawful if fraudulent, coercive, or threatens the peace. The *unlawful purpose* test requires balancing the interests of the pickets, the picketed, and the public. Hence, to a considerable extent it is based upon the exigencies of the case and the good sense of the court.[14]

Freedom of speech has affected liability for picketing since *Thornhill v. Alabama*[15] held that a state's blanket prohibition against picketing a place of business was unconstitutional. Picketing is a medium of communication protected by the first amendment. Although *Thornhill* led some to think that the Supreme Court would rewrite the law of picketing, subsequent labor cases have indicated the Court's satisfaction with the "lawful manner and purpose test."[16] *Thornhill's* effect was to reassert the national interest in protecting public discussion. The first and fourteenth amendments require that the courts assign the proper weight to those values protected by freedom

11 Comment, 66 Yale L.J. 397, 411 (1956), suggests that the codification of the common law of boycott could not pass the void-for-vagueness test because the law is intended to give judges the very discretion in balancing interests which the vagueness doctrine prohibits.

12 Restatement, Torts § 767 (1939); Prosser, Torts § 987 (3d ed. 1964).

13 15 C.J.S. *Conspiracy* §§ 1, 3, 4 (1939).

14 Restatement, Torts § 767 (1939).

15 310 U.S. 88 (1940).

16 Tanenhaus, "Picketing—Free Speech: The Growth of the New Law of Picketing from 1940 to 1952," 38 Cornell L.Q. 1 (1952); Tanenhaus, "Picketing as Free Speech: Early Stages in the Growth of the New Law of Picketing," 14 U. Pitt. L. Rev. 397 (1953); Tanenhaus, "Picketing as a Tort: The Development of the Law of Picketing from 1880 to 1940," 14 U. Pitt. L. Rev. 170 (1953).

of speech. But, the Court has recognized that the free speech aspects of picketing may be outweighed by a legitimate state policy. The manner and purpose of the picketing must be examined to determine if there are some reasonable grounds for disallowing it.[17]

Should this test which examines the manner and purpose be applied to a case of civil rights picketing, or is another test more appropriate? The manner and purpose test permits the courts to weigh the interests of freedom of speech and of the contestants in the context of each factual situation; it allows flexibility. But this is a strong argument for not using the manner and purpose test in civil rights cases. Uncertainty as to legal consequences may deter civil rights groups from exercising their constitutionally protected rights. Furthermore, flexibility provides an opportunity for misuse of the test by a court hostile to the aims of the civil rights movement. Whether flexibility can be preserved while constitutional rights are protected depends on what the Supreme Court finds to be reasonable grounds for disallowing civil rights picketing.

Merely because the Court has withdrawn all but nominal protection from labor picketing[18] does not mean that any state policy will provide reasonable grounds for disallowing civil rights picketing. Labor picketing must be seen in its economic context. Labor picketing like any other economic problem is subject to extensive public regulation in the public interest. But civil rights picketing is a medium of expression, enmeshed in a social and political context.[19] It is concerned with one of the most controversial public issues of our day. All picketing should not be treated alike merely because it can be differentiated from other forms of communication. The real basis for distinction is not the form of communication, rather it is the content of the communication evaluated in the context of its social and political setting.[20]

There is a conflict between the interest protected by the civil law of picketing and the values promoted by the first and fourteenth amendments.[21] When picketing is part of a public discussion on an important issue, it is entitled to more protection. But, the extent of protection depends on a balance struck among the interests involved. After weighing the different interests

[17] Thus, in Hughes v. Superior Court, 339 U.S. 460 (1950), Mr. Justice Frankfurter stated at 465-66: "Picketing is not beyond the control of the states if the manner in which the picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance." The court upheld a state court injunction which forbade picketing by a Negro group which sought quota hiring on the ground that it violated the state's fair employment policy.

[18] International Bhd. of Teamsters v. Vogt, 354 U.S. 284 (1957); International Bhd. of Teamsters v. Hanke, 339 U.S. 470 (1950); Gibboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

[19] Brown v. Louisiana, 34 U.S.L. Week 4143 (U.S. Feb. 23, 1966); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

[20] Brown v. Louisiana, *supra* note 19; Stromberg v. California, 283 U.S. 359 (1931).

[21] This analysis is based upon Mr. Justice Brennan's discussion of the constitutional limits on the law of defamation in Rosenblatt v. Baer, 86 S. Ct. 669, 676 (1966).

involved in labor and racial picketing, the courts have arrived at three positions: (1) civil rights picketing is not entitled to the protection afforded labor picketing because it inflames racial tensions and creates greater likelihood of violence and disorder;[22] (2) both kinds of picketing are equally entitled to the protection afforded groups which desire to publicize their grievances;[23] (3) civil rights picketing is entitled to more protection for two reasons: (a) it is often an outburst by an oppressed group which may have no other means of expressing its grievances; in this sense picketing serves as a safety valve;[24] (b) a protest against racial discrimination is not just an economic question, as it may be in the power struggle between labor and management.[25] In a labor dispute the public's interest is primarily limited to insuring a fair fight between the immediate contestants. The rules of the game are questions of economic policy to be threshed out in legislative halls.[26] However, civil rights picketing, to the extent that it represents a protest against discrimination, is concerned with one of the most vital and controversial issues of our day. To the extent that it represents state action, it contravenes the Constitution, and hence is of paramount concern to the tribunal whose duty it is to preserve that law. But, even when it does not involve

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[22] NAACP v. Webb's City, Inc., 152 So. 2d 179 (Fla. Dist. Ct. App. 1963); Green v. Samuelson, 168 Md. 421, 178 Atl. 109 (1935); A. S. Beck Shoe Corp. v. Johnson, 153 Misc. 363, 274 N.Y. Supp. 946 (Sup. Ct. 1934); 48 Harv. L. Rev. 691 (1935). This reasoning was used in New Negro Alliance v. Sanitary Grocery Co., 92 F.2d 510 (D.C. Cir. 1937), which was reversed at 303 U.S. 552 (1938).

[23] The Supreme Court adopted this position in New Negro Alliance v. Sanitary Grocery Co., *supra* note 22, which held that a Negro group's attempt to obtain employment involved a labor dispute within the meaning of the Norris-LaGuardia Act. Mr. Justice Roberts stated at 561:

> The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association.

See also Centennial Laundry Co. v. West Side Organization, 55 Ill. App. 2d 406, 204 N.E.2d 589 (1965); Anora Amusement Corp. v. Doe, 171 Misc. 279, 12 N.Y.S.2d 400 (Sup. Ct. 1939).

[24] Lawton v. Murray, 61 N.Y.S.2d 721 (Sup. Ct. 1946). See Julie Baking Co. v. Graymond, 152 Misc. 846, 274 N.Y. Supp. 250 (Sup. Ct. 1934), which allowed a group of angry consumers to picket a bakery in protest against extortionate prices. The Court stated, picketing "is salutary to the state, in that it serves as a safety valve in times of stress and strain." *Id.* at 849, 274 N.Y. Supp. at 252.

[25] See Mr. Justice Douglas concurring in Bakery Drivers Local v. Wohl, 315 U.S. 799 (1941).

[26] To a large extent the rules of the game have been laid down in federal labor legislation. See the majority and dissenting opinions in Linn v. United Plant Guard Workers of America, 86 S. Ct. 657 (1966). See also Teller, "Picketing and Free Speech," 56 Harv. L. Rev. 180 (1942); Dodd, "Picketing and Free Speech: A Dissent," 56 Harv. L. Rev. 513 (1943); Teller, "Picketing and Free Speech: A Reply," 56 Harv. L. Rev. 532 (1943).

state action, it is a highly controversial issue well within the ambit of constitutionally protected dialogue. The third position has apparently been adopted by the Supreme Court, and thus it should closely review a civil rights picketing decision on freedom of speech principles, as well as those of freedom of association.

SUPREME COURT REVIEW OF THE EVIDENCE

A decision in a picketing case is based on a factual determination of the manner and purpose of the picketing and the application of a broad legal standard to the facts as found.[27] However, the fact finding may conceal prejudice or sloppy reasoning, and the legal standard is so broad that it has little meaning apart from its application to particular cases. Hence, effective constitutional protection depends upon whether the Court will review the evidence. Two recent cases indicate the Court's position. In *Cox v. Louisiana*[28] the Court overturned breach of the peace and obstructing the sidewalk convictions of the leader of 1500 Negro demonstrators who assembled at a courthouse to protest the arrest of fellow students who had picketed stores with segregated lunch counters. The Court undertook an independent examination of the record and found no conduct which the state had a right to punish. In *New York Times v. Sullivan* the Court stated, "We must 'make an independent examination of the whole record' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion of the field of free expression."[29] After reviewing the evidence, the Court stated: "[T]he proof presented to show actual malice lacks the convincing clarity which the Constitutional standard demands . . . ."[30] *Cox* and *Times* suggest that judgments in civil rights picketing cases must be supported by an independent examination of the whole record, and that unlawful motive must be shown with convincing clarity.

The *Overstreet* decision illustrated the importance of applying these two principles to civil rights picketing decisions, since it was based on the determination of three mental states. Firstly, the Georgia court found that the NAACP, its picketers, and members of the crowd who joined the picketers were all united by a common motive; thus, the finding of a conspiracy was justified. Secondly, they were motivated by a desire to punish the grocer for the beating rather than a desire to protest racial discrimination. The grocer was not motivated by racial prejudice; hence, freedom of speech afforded no protection to the picketing. Thirdly, the court also noted that the picketers' motive was malevolent so that punitive damages were properly awarded. The determination of mental states requires a careful weighing of all the

[27] U.S. Const. Amends. XIII, XIV, XV; Bailey v. Patterson, 369 U.S. 31 (1962); United States v. Alabama, 362 U.S. 602 (1959); Brown v. Board of Educ., 349 U.S. 294 (1955); Barrows v. Jackson, 346 U.S. 249 (1953); Railway Main Ass'n v. Corsi, 326 U.S. 88 (1945).

[28] 379 U.S. 536 (1965).

[29] New York Times v. Sullivan, 376 U.S. 254, 285 (1964). (Citation omitted.)

[30] 376 U.S. at 285-86.

evidence, and thus there is an opportunity for the projection of prejudice into a decision. These determinations must be subject to review.

CRITERIA FOR IDENTIFYING PROTECTED PICKETING

When the Supreme Court examines the evidence in a civil rights picketing decision, it must determine whether the picketing was conducted in a lawful manner and for a lawful purpose. Making this determination requires a careful balancing of the values protected by freedom of speech and the interests protected by the civil law of picketing. Several criteria appear to have emerged from recent civil rights cases.

Lawful Manner

In applying the lawful manner test, the primary problem is determining when picketers should be liable for the acts of onlookers. Civil rights picketing draws crowds, some hostile and some sympathetic. Although it may be relatively easy to identify acts which should not be committed by the picketers, it is not so clear whether the picketers should be liable if the same acts are committed by onlookers. Thus, it is clear that picketers may not commit acts of violence nor frighten customers from the door by intimidating acts, but what if onlookers become riotous or drive customers away? There are circumstances under which a man may be civilly liable if his negligence causes a third party to commit an unlawful act.[31] But generally he will not be liable unless he intended that the third party act unlawfully. The Court has held that a state may not punish civil rights demonstrators merely because they attract a hostile crowd and require police protection.[32] But, these cases dealt with public demonstrations and not with picketing a private business. Whether a different rule should apply in the latter instance would seem to be determined by weighing the interest in protesting discrimination against the interest in protecting the reputation of a business which allegedly practices racial discrimination. Considering the nation's commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, the interest in protecting public discussion of an issue as important as racial discrimination should prevail.[33] Hence, it would seem that proof of intent should be required before liability for "unlawful manner" picketing is imposed upon picketers for the acts of onlookers.

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[31] Prosser, Torts § 33 (3d ed. 1964). But the author states at 176: "There is normally much less reason to anticipate acts on the part of others which are malicious and intentionally damaging than those which are merely negligent; and this is all the more true where, as is usually the case, such acts are criminal."

[32] Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

[33] The balance struck here is between the interest in protecting public discussion of a public issue and the interest in protecting a business' reputation. Compare with this the differing balances advocated by the Justices in the sit-in cases where the question was equal protection. Bell v. Maryland, 378 U.S. 226 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963). Compare also the balance struck under the public accommodations section of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. § 2000(2) (1964).

The *Overstreet* case illustrates the conflicting interests behind the choice of the proper rule of liability for "unlawful manner" picketing. The NAACP pickets attracted a sympathetic crowd. Members of the crowd committed several acts of violence, and customers were intimidated. But, to impose liability upon the NAACP for the unintended and unpredictable acts of a crowd would sharply deter the use of pickets to protest against discriminatory acts. On the other hand, the grocer should be entitled to some relief. His remedy was, of course, to sue those who committed the unlawful acts or to have the police disperse or arrest unruly onlookers. For the NAACP picketing to have been conducted in an unlawful manner, the picketers must have intended the crowd to become riotous. The mere presence of the NAACP pickets should not have been a sufficient basis for liability, even if their presence caused the crowd to gather.

Lawful Purpose

Picketing, to be lawful, must be conducted for a lawful purpose as well as in a lawful manner. Criteria for determining lawful purpose are based on balancing the interests of the picketers, the picketed, and the public. The public's interest in protecting public discussion is guarded by the first and fourteenth amendments. Civil rights picketing addresses itself to one of the most controversial issues of our day. Hence, the interest protected by the civil law of picketing must yield in the absence of a strong countervailing interest.[34] Where there is a countervailing interest and an effective alternative remedy available to protest against discrimination, civil rights picketing should not be protected.

Decisions considering public demonstrations which urge public officials or the public generally to end segregation have established that protests against discrimination are precisely that sort of expression which the first amendment was intended to protect.[35] But beyond this, picketing a private

[34] Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964); Kelly v. Page, 335 F.2d 114 (5th Cir. 1964); City of Sumter v. Lewis, 241 S.C. 364, 128 S.E.2d 684 (1962). *But see* NAACP v. Webb's City, Inc., 152 So. 2d 179 (Fla. Dist. Ct. App. 1963), *rev'd for mootness*, 376 U.S. 190 (1964); Clemmons v. CORE, 201 F. Supp. 737 (E.D. La. 1962). The convictions in *Clemmons* arising out of the demonstration were reversed in Cox v. Louisiana, 379 U.S. 536 (1965). The Court has stated that discrimination interferes with the free flow of goods and persons within the country by placing an artificial stricture on commerce. Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). The equal protection clause prohibits any form of state action which promotes or sanctions racial discrimination. A state may not make its judicial machinery available to its citizens to effect a policy of racial discrimination. Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948). How, then, can a state court hold that the interest of those protesting against discrimination is not superior to the interest of a business which practices it? *But see* Bell v. Maryland, 378 U.S. 226 (1964). Discrimination also violates the fifth amendment due process clause because it is contrary to fundamental concepts of fairness. Bolling v. Sharp, 347 U.S. 497 (1954).

[35] Mr. Justice Stewart stated that Edwards v. South Carolina, 372 U.S. 229 (1963), revealed an exercise of freedom of speech in its "most pristine and classic form."

business which practices discrimination should also be within the ambit of freedom of speech. In *Thornhill v. Alabama* Mr. Justice Murphy stated: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[36] *Thornhill* taught that picketing connected with a labor dispute could contribute to constitutionally protected dialogue because it provided the workingman an opportunity to express his view in the dispute. This afforded the public an opportunity to hear both sides and to react accordingly. The fact that the reaction might be social ostracism or economic pressure against a business rather than political action did not make the labor dispute any less of a public issue. Nor was the form of communication a satisfactory basis for identifying constitutionally protected dialogue. The Constitution looks to the content of the communication evaluated in the context of its social and political setting. Picketing is a medium which can be used to debate the racial issue by groups which do not have access to the more sophisticated forms of communication.

However, the cases which concern picketing to compel employers to hire Negroes, illustrate that a strong countervailing interest and an effective alternative remedy may justify withholding constitutional protection from certain picketing to protest discrimination.[37] These cases distinguish between protesting against discrimination and compelling an employer to hire Negroes.[38] Picketing of the latter sort violates a policy of permitting hiring based on merit. It also encourages Negroes to organize and compete with white organizations for jobs, thus heightening racial tensions.[39] Furthermore, title VII of the Civil Rights Act of 1964[40] and fair employment legislation enacted by many states provide a remedy for victims of discriminatory hiring practices in many cases. Thus, it is possible to declare picketing to secure Negro employment unlawful without sacrificing either the policy supporting a protest against discrimination or the policy against labor organized along racial lines. Where an employer is not covered by fair employment legislation, the reasoning of Mr. Justice Traynor is persuasive:

> In their struggle for equality the only effective economic weapon Negroes have is the purchasing power they are able to mobilize to induce employers to open jobs to them . . . . There are so few

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[36] Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

[37] Rosen, "The Law and Racial Discrimination in Employment," 53 Calif. L. Rev. 729 (1965); Note, 18 U. Miami L. Rev. 488 (1963).

[38] Hughes v. Superior Court, 32 Cal. 2d 850, 198 P.2d 885 (1948). The court stated, "It may be assumed for the purpose of this decision, without deciding that if such discrimination exists, picketing to protest it would not be an unlawful objective. However, no such broad purpose is shown to have motivated the activities here." *Id.* at 855, 192 P.2d at 888. See also Fair Share Organization v. Mitnick, 134 Ind. App. 675, 188 N.E.2d 840 (1963); Young Adults for Progressive Action, Inc. v. B & B Cash Grocery Stores, Inc., 151 So. 2d 877 (Fla. Dist. Ct. App. 1963).

[39] Liefshitz v. Straughn, 261 App. Div. 757, 27 N.Y.S.2d 193 (1941).

[40] 78 Stat. 266, 42 U.S.C. § 2000(e) (1964).

> neighborhoods where Negroes can make effective appeals against discrimination that they may reasonably regard the seeking of jobs in neighborhoods where their appeal may be effective the only practical means of combating discrimination against them. In arbitrating the conflicting interests of different groups in society courts should not impose ideal standards on one side when they are powerless to impose similar standards upon the other.[41]

In *Overstreet* the Georgia Supreme Court found two reasons for declaring the purpose of the picketing to be unlawful. It found a countervailing policy and an alternative remedy to justify imposing liability upon a protest against racial discrimination. In the words of the court: "If he, [the grocer] as defendants contend, committed an assault and battery upon an employee, that is a criminal act, the punishment of which rests with the courts and not with private individuals. Otherwise we have anarchy."[42] Thus, since the purpose of the picketers was to punish the grocer for his criminal act, it was unlawful because it usurped the function of the courts. The court also found that there had been no racial discrimination and, therefore, the picketing was not entitled to constitutional protection. In the words of the court: "The single incident, whether caused by plaintiff firing the boy or whipping him—whichever is true—and the evidence as to what occurred is inconclusive, would not justify the conclusion that the boy's race had anything to do with it. There is no evidence that what happened occurred because he was a Negro. It might as well have happened to a white boy. This is obviously not a case of peaceful picketing to protest racial discrimination."[43] The court concluded that since there was no racial prejudice, the constitutional protection afforded protests against discrimination did not apply.

While the policy favoring the integrity of the judicial process may in some cases outweigh the policies behind civil rights picketing, it is not so clear that *Overstreet* was such a case. In *Cox v. Louisiana*,[44] the Supreme Court held that a state may prohibit picketing around its courthouses in order to protect them from the influences of the mob. In *Overstreet*, however, the picketing was conducted for the purpose of calling the public's attention to the commission of a crime.

If the grocer committed neither a criminal act nor an act of racial discrimination, then picketing constituted a misrepresentation. According to the common law, picketing is entitled to protection only so long as it is honest; the risk of liability for misrepresentations is placed upon the one making the assertions.[45] This is the policy of the law of libel and the law of disparagement, and to the extent that picketing is communication it should seemingly be treated analogously. But it can be persuasively argued that the strong constitutional policies behind protests against racial discrimination

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[41] Hughes v. Superior Court, 32 Cal. 2d 850, 868, 198 P.2d 885, 896 (1948) (dissenting opinion).

[42] NAACP v. Overstreet, 321 Ga. 16, ——, 142 S.E.2d 816, 823 (1965).

[43] *Id.* at 831.

[44] 379 U.S. 536 (1965).

[45] Prosser, Torts § 124 (3d ed. 1964).

should protect protests which are made in good faith even if no discriminatory acts are committed. *New York Times v. Sullivan*[46] requires proof of actual malice for recovery in an action for libel of a public official. The Court reasoned that if proof of actual malice were not required, the fear of civil liability would deter honest criticism. Democracy demands that criticism of public officials be encouraged, so that government may remain responsive.

Even beyond the case of public officials, cases involving speech are to be considered against the background of a profound commitment to the principle that debate should be uninhibited, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attack.[47] Does the same reasoning apply to protests against racial discrimination? Imposing liability for false protests against discrimination which are made in good faith would undoubtedly have a deterring effect. But, does the social harm caused by the deterring effect outweigh the social harm caused by damaging the reputation or good will of an innocent business? The question requires a delicate balancing of conflicting policies.

CONCLUSION

In conclusion, the right of Negroes to organize to protect themselves against discrimination should be protected from the civil laws just as much as from the criminal laws. Consequently, the Supreme Court should review and reverse a picketing case on the grounds of freedom of association if a lower court applies the law in such a way as to discriminate against a civil rights organization. Furthermore, the Court should closely supervise a state court's application of the lawful manner and lawful purpose tests to insure freedom of speech. Picketing is not conducted in an unlawful manner merely because onlookers commit coercive or violent acts unless the picketers intended that they act unlawfully. Picketing which represents a protest against discrimination is not conducted for an unlawful purpose unless there is a strong policy against the picketing and an alternative remedy available to attack the discriminatory practices. A civil rights organization should be permitted to protest against a discriminatory act even if the act is also a crime. It should not be liable if it in good faith falsely accuses a business of racial discrimination.

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[46] 376 U.S. 254 (1964).

[47] This reasoning has been applied to libel actions in the labor-management field. Linn v. United Plant Guard Workers of America, 86 S. Ct. 657 (1966). See also Rosenblatt v. Baer, 86 S. Ct. 669 (1966).